

JAN 18 2006

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MILCA BUROTTO,

Plaintiff - Appellant,

v.

CONTINENTAL CASUALTY
COMPANY; WELLPOINT HEALTH
NETWORKS, INC. DISABILITY PLAN,

Defendants - Appellees.

No. 04-55180

D.C. No. CV-02-09601-RJK

ORDER*

Appeal from the United States District Court
for the Central District of California
Robert J. Kelleher, Senior Judge, Presiding

Submitted January 10, 2006**
Pasadena, California

Before: SCHROEDER, Chief Judge, GOODWIN, Circuit Judge, and
SEDWICK***, District Judge.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable John W. Sedwick, United States District Judge for the District of Alaska, sitting by designation.

Appellant Burotto argues for the first time on appeal that discretionary clauses in disability insurance policies are illegal and contrary to the public policy of California. We do not believe that this issue should be addressed for the first time on appeal. We **VACATE** the judgment and **REMAND** to the district court to permit the parties the opportunity to develop a record and offer arguments regarding the validity of discretionary clauses under California insurance law and under ERISA, 29 U.S.C. §§ 1001 *et seq.*

AARP's motion for leave to file an amicus brief is DENIED AS MOOT.

IT IS SO ORDERED.